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# State v. Blake Appellant's Brief Dckt. 43316

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent,	)	Supreme Court No. 43316
	)	
vs.	)	Ada County District Court
	)	Case No. CR-FE-2014-6313
KATHRYN LAURA BLAKE,	)	
	)	
Defendant/Appellant.	)	
_____	)	

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OPENING BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURT OF THE  
FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

---

HONORABLE STEVEN HIPPLER  
District Judge

---

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## II. STATEMENT OF THE CASE

### A. *Nature of the Case*

Appellant Kathryn (Katie) Blake is appealing from the conviction, following a jury trial, of conspiracy to commit extortion. R 261-263. This Court should vacate and remand because the district court erred in denying Katie's motion for relief from prejudicial joinder, because the district court erred in admitting irrelevant evidence over objection; and because the district court erred in not giving a limiting instruction as to evidence admissible against the co-defendant, but not Katie.

### B. *Procedural History*

Katie was charged by indictment in Count I with conspiracy to commit grand theft by extortion, I.C. §§ 18-1701, 18-2403(2)(b)(e)(1)(9), 18-2704(1)(a)(1), and in Count II with grand theft by extortion, I.C. §§ 18-2403(2)(b)(e)(1)(9), 18-2407(1)(a)(1), 18-204. R 37-40. Thereafter, the court consolidated the case against Katie with that of the case against her alleged co-conspirator, Patrick Oar. R 43.

Both Katie and Mr. Oar sought relief from the prejudicial joinder. R 72-73. However, the court denied relief. R 89.

Following a jury trial, the jury convicted Katie of conspiracy in Count I, but could not reach a verdict on Count II. R 246. The court imposed an aggregate sentence of 10 years, two years fixed followed by eight indeterminate, and suspended the sentence and placed Katie on probation for 10 years. R 251-259.

This appeal timely follows. R 261-263.

### *C. Statement of Facts*

When Katie was nineteen years old, Mr. Oar, who was born in the 1950's, recruited her to work for his employer, attorney Denny Sallaz, in marketing Sallaz's law firm. Tr. p. 1045, ln. 24-p. 1046, ln. 19; State's Ex. 24.

Six years later, on March 18, 2014, Mr. Oar was arrested and booked into the Ada County Jail. Tr. p. 405, ln. 10-13.

On March 24, 2014, he called Katie and told her that he wanted her to get PI credentials through Mr. Sallaz so that she could come visit him at the jail. He told her that it would be good for her to learn PI and paralegal work both for the experience and as a way to earn a living. He also said he had recruited a new client for Mr. Sallaz from the jail and that he had a game plan to get out from under the problems created by the parole violation that put him in jail. State's Ex. 8, Call 27<sup>1</sup>; Tr. p. 826, ln. 25-p. 827, ln. 18.

This was just one of "dozens if not hundreds" of calls Mr. Oar made to Katie and possibly others. Tr. p. 813, ln. 21-p. 814, ln. 2. Of those many calls, the State presented 25 at trial. Tr. p. 814, ln. 10-13.

On March 28, 2014, Mr. Oar called Katie again and asked her again to get PI or paralegal credentials so that she could come visit him. He told her that he had a client for Mr. Sallaz worth \$10,000, but Mr. Sallaz had to come see him soon to

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<sup>1</sup> Exhibit 8 is a recording of the jail calls. The calls are numbered in reverse order, with the first call in time being given the highest number and the last call in time being given the number 1.

make it work. He also told Katie that he had a PI job for himself and her but that she had to do some work and come see him to make that happen. He noted that his jail stay was giving him a business opportunity. State's Ex. 8, Call 25.

The next day, Mr. Oar called again. Again, he told Katie to get a letter from Mr. Sallaz to allow her to visit him in the jail. He said the he had developed \$4000-5000 worth of PI work for them to do and also asked that she bring photos of herself to him. He said he had two to three retainers and that he was going to make her part of an LLC. State's Ex. 8, Call 24.

On April 1, 2014, Mr. Oar called Katie again telling her to get a letter from Mr. Sallaz to allow her to visit him. Katie responded by talking about marketing work for Mr. Sallaz and a newsletter for that purpose. Mr. Oar replied that no matter what he could generate \$2000 a month income for her from PI work, plus \$1000 if she could come to the jail that night. And, again, he asked for pictures of her. State's Ex. 8, Call 23.

On April 3, 2014, Mr. Oar called Katie again. She told him that she had spoken with Mr. Sallaz and would get a letter to come see him that afternoon with Mr. Sallaz. She also talked about the marketing work and newsletter. Mr. Oar told her that they could make money and she was going to be "a fucking paralegal" and learn DUIs; and, if he wound up having to go to the prison, she would become an expert on pardons. Again, he asked her to send him pictures of herself. State's Ex. 8, Call 22.

Katie did not go see Mr. Oar that afternoon. State's Ex. 3. And, on April 7,

2014, Mr. Oar called her again, asking her to come out and telling her that he had a PI job that would pay \$2000 to each of them. Katie said that she would get in touch with Mr. Sallaz that day. State's Ex. 8, Call 21.

On April 10, Katie had still not been to see Mr. Oar and he called again. This time he sounded put out with her and told her to come see him. He said that if she would do what he tells her to do, she could make \$3000 per month. He said, "Just show up," and "You come out here and talk to me." State's Ex. 8, Call 20.

On April 12, 2014, Katie visited Mr. Oar at the jail. State's Ex. 3. After the visit, Mr. Oar called her again. He asked about photos she was to take and said that \$1000 would arrive on Monday. He referenced a list of tasks he had given her and asked her to come visit him again as quickly as possible. State's Ex. 8, Call 19.

On April 15, 2014, Mr. Oar called Katie again with directions to come visit him that night at the jail saying he had a phone number she had to call that night. State's Ex. 8, Call 18. And, she did visit that evening. State's Ex. 3. After the visit, Mr. Oar called her again. He asked if she had made the call, and she responded that the call went to voice mail. Katie then asked what she should say to the person she was trying to call. Mr. Oar replied that she should say that she is a PI and that the woman's husband has hired them to collect on loans. Mr. Oar said that the woman knew that she needed to send money to cover expenses and Katie was to arrange how the money was to be transferred. Mr. Oar directed Katie to have the woman wire the money for Idaho Parole and Criminal Services (his business) in care of Katie. State's Ex. 8, Call 17.



On April 16, 2014, Mr. Oar called Katie again and gave her various instructions. In that call, she told Mr. Oar that she had not spoken to “Gabby” yet, and Mr. Oar told her it was just as well as he needed to have her read some paperwork before they spoke. He also expressed some dissatisfaction with Katie’s failure to read papers he had given her saying that he gives her stuff but she doesn’t read it. They also spoke about Katie coming to the jail later that day. State’s Ex. 8, Call 16. And, she did visit that day. State’s Ex. 3.

Mr. Oar called again that day after the visit. He wanted to know if Katie had called Gabby, which she had not. She said she wanted to wade through his paperwork before she called. He also directed her to go by a particular motel to see what she could find out. He said that the person there wanted to make a payment on a loan and would do it in a few days. State’s Ex. 8, Call 15.

The next day, April 17, Mr. Oar again called Katie. He jokingly referred to himself as an honorary member of the cartel. He also talked more to her about calling Gabby; getting in touch with attorney V.K. Smith who would have some work for her; explained how to serve subpoenas; directed her to go get business cards and a sexy business suit; said that once she had those things, he would refer her to other lawyers who might have work; and asked her to come visit him the next day. State’s Ex. 8, Call 14.

On April 18, Mr. Oar called Katie again. Katie told him that she had spoken to Gabby and that Gabby had questions about what would happen if they did not retain the assets. Mr. Oar said that they had the one they would pick up that night,

and Katie said that she really did not understand. Later in the conversation, Katie again said that she did not understand. And, Mr. Oar asked her to come see him that evening to pick up some papers. State's Ex. 8, Call 13. The jail log shows that Katie did go visit that evening. State's Ex. 3. Later, that night, Mr. Oar called Katie again and talked about a poem and picture and also said he would talk to her about the one at the motel tomorrow and made reference to another "12,000." State's Ex. 8, Call 12.

The next day, April 19, Mr. Oar called Katie again. He talked to her some more about the transfer of money from Gabby to her. Katie was confused and asked whether she was holding this money or what and Mr. Oar said it was her money. He also spoke about the money she might get from the motel, saying that they want to deal. Again, he told her to get business cards and a suit and also a micro-cassette player. He further discussed an ad in the Boise Weekly for his parole services company and said that he needed to instruct her as to how to respond to calls generated by the ad. He also advised that in collections she should never give out her name or phone number. State's Ex. 8, Call 11.

On April 22, Mr. Oar called again. Katie told him that Gabby had mailed a check made out to Katie and Mr. Oar was not happy about that because it would have been better to have the money wired in the name of the business. He then made reference to the motel saying that Katie did not have to be "as mean" and just had to say that they were passing the hat around for a friend's legal needs. He also asked her to come visit him about the Boise Weekly ad and again pressed her to get

business cards. State's Ex. 8, Call 10. Katie did go to the jail that evening. State's Ex. 3.

On April 25, 2014, Mr. Oar called again and asked Katie to see Mr. Sallaz about potential clients. He also asked her to come to the jail. State's Ex. 8, Call 9. But, she did not visit him that day. State's Ex. 3.

On the 28<sup>th</sup>, Mr. Oar called again. He was unhappy to learn that the check from Gabby had not arrived yet. He was also stressed and said he had had someone else do some of his work because Katie hadn't done it. He said he was serious about his timeline and told Katie to come see him that day. State's Ex. 8, Call 8.

Mr. Oar called again on the 28<sup>th</sup>, to see if the check arrived, which it had. He also told Katie that she had too much work to do as a PI to continue being a waitress and told her that he would see her as soon as she cleaned up and got to the jail. State's Ex. 8, Call 7.

Mr. Oar made a third call on the 28<sup>th</sup>, upset that Gabby may have stopped payment on the check. But, Katie assured him that she had spoken to Gabby and payment was not stopped. State's Ex. 8, Call 6. And, Katie did go to the jail later that day. State's Ex. 3.

On May 1, 2014, Katie went to a motel in Boise looking for MD<sup>2</sup> who worked the graveyard shift there. Katie arrived during that shift at 1:00 am. Tr. p. 883, ln. 8-p. 884, ln. 3. Katie walked in and called MD by her first name. MD did not know

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<sup>2</sup> MD was a confidential informant in another case and so is identified only by her initials in this brief.

who Katie was. However, Katie said that she was there on behalf of Omar. MD knew Omar, both because she owed him money for methamphetamine and because she was the CI who gave information that led to Omar's arrest. However, MD did not communicate this information to Katie. Katie called herself Priscilla. MD was nervous because she did owe Omar money and because she had set Omar up with the police. Tr. p. 884, ln. 6-p. 885, ln. 3.

Katie said that she had some payment options from Omar and slid them on a piece of paper to MD. MD said that she pushed the paper back to Katie and told her that she would pay the full \$4000 she owed. Tr. p. 886, ln. 1-p. 888, ln. 20.

Katie also gave MD a letter from Omar. The letter stated that Omar was thinking of how to collect from her as he was in trouble and needed to pay a lawyer. He wrote that if she had any questions, she should let him know. He wrote that his friends would make her an offer of \$3500 or two payments of \$2000 in two weeks or three payments of \$1500 no later than 30 days. He then wrote that if he sold the debt, the buyer would probably "double the price with bad interest if not [paid] on time," but right now his friends could negotiate for him. The letter made no reference to the debt being a drug debt nor to MD's status as a CI. State's Ex. 11.

MD did not read the letter until the next morning when she got off work. Tr. p. 889, ln. 17-20.

Before Katie left, she gave MD a piece of paper that said "Pracilla (sic) 713-0124." Tr. p. 890, ln. 6-18; State's Ex. 12.

MD testified that Katie is about 5'4" and 100 pounds and her demeanor and

language were not threatening. Tr. p. 934, ln. 16-p. 935, ln. 3. MD did not think that Katie was trying to scare her. Tr. p. 937, ln. 21-23.

Later that day, Mr. Oar called Katie and she said that she was not sure what had happened but that MD was going to pay the full \$4000 on Monday. Mr. Oar pressured Katie to come visit him and to quit her job saying that \$1000 of the \$4000 would go to Katie and that she could make more money. State's Ex. 8, Call 4.

After MD read the letter from Omar, she called Detective Bruner. Tr. p. 890, ln. 25-p. 891, ln. 1. At his direction she met with him and prepared to meet with Katie again on May 5, 2014. Tr. p. 893, ln. 3-8.

On May 3, 2014, Mr. Oar called Katie again telling her she needed to come see him the next day. He also told her that \$2000 of what she was going to collect would be hers. She expressed surprise saying, "I had no idea." State's Ex. 8, Call 4.

Katie did not go visit as directed on May 4. On May 4, Mr. Oar called her and Katie said that she did not have her car. State's Ex. 8, Call 2.

On May 5, Mr. Oar called Katie again because Katie did not come visit on the 4<sup>th</sup> as she had promised. Katie told him that she would come in that day. Mr. Oar gave her instructions to call on his friends to give her a ride if needed. Mr. Oar was stern with Katie, telling her that if she could not do what he asked he would call on someone else for help. State's Ex. 8, Call 1.

Katie did go visit at the jail later on May 5. State's Ex. 3.

Then, later in the evening, Katie went to meet MD. During the meeting, MD carried \$2000 supplied by Detective Bruner and wore a wire. Tr. p. 893, ln. 14-894,

ln. 2.

MD met Katie in a Walmart parking lot. Katie got into MD's car and MD gave her \$2000, but told her it was \$4000. Tr. p. 894, ln. 20-p. 895, ln. 17. The wire recording is difficult to hear, but on it MD engaged Katie in conversation. MD told Katie that she wasn't the first person to ask for money for Omar and Katie responded that she worked for PI services and was working with Omar and his wife in Texas and that the letter was from Omar. MD said that she felt the letter was a little bit threatening. Katie said that Omar had told her that he had people who would take care of it if she didn't and MD said she would like to deal with Katie. Katie responded that she was harmless. At the end of the conversation, they both wished each other a good evening. State's Ex. 28. MD testified that during the encounter, she did not think that Katie was trying to scare her. Tr. p. 937, ln. 21-23.

MD testified that in a part of the recording that is unintelligible she told Katie that the money was for a drug debt and Katie just acknowledged that. Tr. 896, ln. 20-p. 897, ln. 21.

MD also testified that prior to Omar's arrest she had asked him what he would want her to do if she still owed him money. He told her that he would have his wife contact her and that would be the way to return his money. And, that fit with what Katie told her - that she had been in contact with Gabby. Tr. p. 932, ln. 17-p. 933, ln. 6.

MD told the jury that she was not afraid of Katie, but she was afraid of other

people who might harm her because of her debt to Omar and because of her role as a CI whose help to the police had resulted in arrests. Tr. p. 942, ln. 16-25; p. 947, ln. 12-17.

Immediately after Katie left the meeting with MD, Detective Bruner had her arrested. Tr. p. 634, ln. 19-p. 635, ln. 19. Katie was completely cooperative upon her arrest, waived her constitutional rights, was polite, and gave an interview. She also directed Detective Bruner to letters and other documents from Mr. Oar that were at her house and otherwise would have been unknown to the State. Tr. p. 832, ln. 21-p. 833, ln. 22; p. 836, ln. 24-p. 837, ln. 25. Katie even gave Detective Bruner letters that she had not yet opened. Tr. p. 841, ln. 10-19.

State's Exhibit 14 was a letter from Mr. Oar to Katie wherein he apologized to her for not explaining things to her saying that he mistakenly assumed that they were on the same wavelength or in other cases that he mistakenly believed he had explained things when he had not.

In her interview, Katie said that she was a waitress for Cheerleaders and a private investigator. She said she worked for Mr. Sallaz. Tr. p. 659, ln. 4-16. Katie said that she had received a check from Omar's wife, Gabby, for \$1000, to pay for PI work, which she had deposited into her personal bank account. Tr. p. 661, ln. 11-19. However, Mr. Sallaz was not aware of that transaction. Tr. p. 661, ln. 20-25. Katie answered questions about her encounter with MD and Detective Bruner testified that Katie said that she thought MD had been scared. Tr. p. 665, ln. 16-17. On cross-examination, Detective Bruner clarified that Katie told him that her

impression of MD at the motel was that MD was surprised and it was only in talking with him that Katie could say in hindsight that MD appeared scared. Tr. p. 834, ln. 2-9. Katie also said that she had never met Omar. Tr. p. 671, ln. 12-13. Detective Bruner questioned Katie about Sami, who was another individual he had investigated in the methamphetamine conspiracy. Katie reported that she had taken pictures of a car wash where Sami worked, but that she had not contacted Sami because that was out of her comfort zone. Tr. p. 662, ln. 22-p. 664, ln. 7. Katie told the detective that she had a feeling that something was fishy but she did not think it was that big a deal. Tr. p. 690, ln. 14-16. Detective Bruner told her late in the interview that there was a lot more going on than she realized. Tr. p. 836, ln. 13-17. However, the detective apparently did not ask Katie whether she and Mr. Oar had an agreement to extort money from MD or others as he did not offer any testimony on that point.

In all the conversations and writings reviewed between Mr. Oar and Katie, Mr. Oar never told Katie that what she was doing was collecting drug debts. Tr. p. 697, ln. 11-24. Rather, Katie told Detective Bruner that she did not understand any of the debts to be drug debts. Tr. p. 698, ln. 1-6.

The letters and other documents collected from Katie included instructions from Mr. Oar to her about tasks to complete relative to Idaho Parole and Criminal Services, his own parole hearing, messages for Mr. Sallaz, business card designs, and PI work. He also wrote out rules for her to follow and included a drawing of



Katie as a sexualized dancer and himself as a mariachi singer.<sup>3</sup> One of the letters, which Katie had not read, mentioned Detective Bruner's name. Tr. p. 841, ln. 10-p. 842, ln. 6. Katie appeared surprised by this. Tr. p. 842, ln. 12-24. However, Detective Bruner thought the surprise was disingenuous. Tr. p. 13-19. None of the documents memorialize any agreement between Katie and Mr. Oar to commit extortion. Rather, all appear to indicate he viewed her as a possible love interest and as an employee of sorts being given specific tasks to accomplish. State's Ex. 14-26.

The jail had no record of Katie ever communicating directly with Omar: Omar never telephoned Katie; she never visited him and there were no letters between them. Tr. p. 811, ln. 14-18; p. 812, ln. 8-10, p. 813, ln. 1-3.

Katie testified that Mr. Oar's statements that he loved her made her uncomfortable, but she felt bad for him because he was in jail. Tr. p. 1047, ln. 17-20. However, she kept all of her eight visits at the jail with him short because they did not have a lot to talk about and because she did not feel comfortable talking with him. Tr. p. 1065, ln. 1-7. She did not enjoy the visits and went only because he asked and it is hard for her to say no to people. Tr. p. 1131, ln. 10-23. She further testified that she was not really clear on what Mr. Oar had wanted her to do, although it had to do with help for his parole hearing, obtaining new clients for Mr. Sallaz, getting training on doing screenings and helping with Rule 35 motions,

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<sup>3</sup> Throughout the recorded phone calls, Mr. Oar appears to be attempting to flirt with Katie and to be implying that he might be in love with her. State's Ex. 8.

becoming part of an LLC, and doing PI work. Tr. p. 1049, ln. 8-p. 1050, ln. 22. She felt pressured to do the work because she did not want to let anyone down and she needed money. Tr. p. 1051, ln. 21-24. She was never given the opportunity to decide for herself whether she wanted to be involved with Mr. Oar's dealings with Omar, because she was never told the things that Mr. Oar knew about Omar. Tr. p. 1056, ln. 1-15.

With regard to MD, Mr. Oar told Katie that MD owed money to Omar who was a businessman. She did not believe that she was supposed to scare or threaten MD and she did not intend to do so. Tr. p. 1055, ln. 10-p. 1060, ln. 24. Katie never met or spoke to Omar. She was never told anything about him except that he was a business owner who was housed with Mr. Oar at the jail. Tr. p. 1054, ln. 1-p. 1055, ln. 25.

Katie did not read the papers Mr. Oar gave her both because they were hard to read and because she was not invested in this at all until after she got paid. Tr. p. 1066, ln. 3-7. After she received the \$1000 from Gabby, she felt obligated to do some of the work Mr. Oar had been asking her to do. *Id.*

As noted above, the jury could not reach a verdict on Count II, theft by extortion, but did reach a guilty verdict on Count I, conspiracy to commit theft by extortion. R 246.

### III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in not granting the motion for relief from prejudicial joinder?
2. Did the district court err in admitting over objection evidence against Katie that Omar told Mr. Oar that he wanted to kill Detective Bruner and the confidential informant as statements in furtherance of the conspiracy and in admitting over objection evidence against Katie regarding Omar's drug activities and the State's investigation thereof including evidence of the use of the CI and the danger to the CI as Katie was unaware of any of this information and it could not have played a role in her involvement or non-involvement with a conspiracy or in her interactions with MD?
3. Did the district court err in failing to give a limiting instruction as to evidence admissible against Mr. Oar but not against Katie?

### IV. ARGUMENT

#### *A. The District Court Erred in Denying the Motion for Relief from Prejudicial Joinder*

##### 1. Facts Relevant to Argument

Prior to trial, Katie joined Mr. Oar's motion for relief from prejudicial joinder. R 72-73.

She argued that the letter she gave to MD was benign on its face; it was only threatening to MD because MD knew that Omar was a dangerous man. Tr. p. 50, ln. 13-51. As the court noted: "If I had bought stuff from Wal-Mart and got this

letter from Wal-Mart, I probably wouldn't be worried for my safety. If I got this because I was buying a pound of meth, I might be . . .” Tr. p. 51, ln. 8-13.

However, the State had no evidence that Katie was aware that Omar was a dangerous man. Tr. p. 818, ln. 8-10.

Nonetheless, the State had evidence from Mr. Oar that went to show that Omar was dangerous. Specifically, Mr. Oar told Detective Bruner repeatedly that Omar intended to have Detective Bruner and MD, whom Omar knew was the CI against him, murdered, possibly along with members of their families. Tr. p. 496, ln. 4-13; p. 498, ln. 19-22; p. 583, ln. 12-p. 592, ln. 9. Mr. Oar told the detective that Omar had recruited him to assist in this plan by moving information in and out of the jail including the murder instructions for Omar's associates and obtaining information about the detective's and the CI's addresses, vehicles, family members, and places where they could all be found. Tr. p. 496, ln. 20-p. 497, ln. 8; p. 500, ln. 6-21. He also told Detective Bruner that Omar had asked him to find a warehouse for the killers near the airport to use while they were in town to complete the murders. Tr. p. 593, ln. 18-p. 594, ln.1. Detective Bruner found this information extremely concerning and took steps to protect himself and others. Tr. p. 504, ln. 4-p. 505, ln. 11; p. 594, ln. 12-p. 595, ln. 5.

In addition, the State had evidence about the size and scope of Omar's drug dealings in Idaho, although it did not have any evidence that Katie knew anything about any of that. Tr. p. 505, ln. 6-17. The investigation involved several local and federal agencies, took over a year, and resulted in the arrests of 14 people. Tr. p.

505, ln. 18-p. 509, ln. 13. Omar obtained methamphetamine in California which had been made in Mexico. He and at least one other person regularly drove the drug to Idaho where Omar would meet with distributors and give them various quantities. Each of the distributors had people beneath them that they distributed to and so on down the chain until the methamphetamine reached end users on the Boise streets. Tr. p. 514, ln. 14-p. 515, ln. 8. Omar charged up to \$10,400 per pound for the methamphetamine he sold to his distributors. Tr. p. 533, ln. 21-25. At the time of his arrest, Omar had five pounds of the drug in his vehicle. Tr. p. 526, ln. 5-8. The State had evidence that one of Omar's distributors was afraid that he would be hurt or killed by Omar after he became indebted to Omar for \$80,000. Tr. p. 534, ln. 20-23.

Although the State did not present any evidence that Katie knew that MD was the CI against Omar and others in the drug conspiracy, the State presented evidence that the number one obstacle the police face in getting someone to agree to be a CI is fear. The fear exists because selling drugs is dangerous and a lot of violence is associated with sales. Confidential informants face the danger of being beaten severely or murdered for even talking with the police, let alone cooperating with them. Tr. p. 525, ln. 7-24.

## 2. Argument

The district court erred in failing to grant the motion for relief from prejudicial joinder. As a result, highly prejudicial evidence, not relevant to Katie's case, was presented to the jury resulting in an unfair trial.

Actions properly joined under ICR 8(b) may be severed under ICR 14 if it appears that a joint trial would be prejudicial. *State v. Gamble*, 146 Idaho 331, 337, 193 P.3d 878, 884 (Ct. App. 2008). The decision of whether to grant a motion to sever lies within the trial court's discretion. *State v. Longoria*, 133 Idaho 819, 824, 992 P.2d 1219, 1224 (Ct. App. 1999); *State v. Orellana-Castro*, 158 Idaho 757, 762, 351 P.3d 1215, 1220 (2015). While the defendant/appellant bears the burden to demonstrate prejudice, *State v. Martinez*, 109 Idaho 61, 66, 704 P.2d 965, 970 (Ct. App. 1985), *overruled on other grounds*, 111 Idaho 281, 723 P.2d 825 (1986), the trial court has a continuing duty to sever should prejudice appear at any stage of the trial. *State v. Cochran*, 97 Idaho 71, 74, 539 P.2d 999, 1002 (1975).

In reviewing a denial of a motion to sever, the appellate court conducts a post-trial review to determine whether one or more potential sources of prejudice actually occurred during the trial. *State v. Longoria*, 133 Idaho 819, 824, 992 P.2d 1219, 1224 (Ct. App. 1999), citing *State v. Abel*, 104 Idaho 865, 868, 664 P.2d 772, 775 (1983).

Katie argued that her trial should be severed from Mr. Oar's because the evidence regarding Omar, including his drug dealings, his alleged intention to have Detective Bruner and MD murdered, and the CI's fear of him were all inadmissible against Katie because she was unaware of any of these matters. Tr. p. 47, ln. 16-p. 64, ln. 20. In the argument, the court agreed with Katie that certain evidence including evidence that Omar was seeking information on Detective Bruner and his family and that Omar was a dangerous person was not admissible against Katie,

but could be admitted against Mr. Oar. Tr. p. 49, ln. 9-p. 50, ln. 8; p. 52, ln. 13-16; p. 54, ln. 6-17. However, the court concluded that this problem could be resolved through cross examination and the use of limiting instructions. Tr. p. 50, ln. 3-8; p. 53, ln. 15-17; p. 54, ln. 6-17, Tr. p. 55, ln. 20-24; Tr. 10/21/14, p. 19, ln. 19-p. 20, ln. 9.

In the course of the argument, the court stated, “If there’s no other evidence in the case and the only evidence that ties Ms. Blake to making a threat is this statement by Mr. Oar that [Omar] is dangerous, then it seems to me that you’ve got a pretty good motion to dismiss after the evidence is presented by the state, right?” Tr. p. 54, ln. 21-p. 55, ln. 1.

After hearing argument, the court denied the motion for relief from prejudicial joinder. Tr. 10/21/14, p. 17, ln. 3-p. 21, ln. 20.

At the trial, the court admitted all of the evidence set out at the beginning of this argument. Prior to the admission of the evidence, the court heard argument regarding whether a limiting instruction should be given. Tr. p. 468, ln. 6-p. 486, ln. 24. The court concluded that it would admit the evidence based upon the State’s allegation that Mr. Oar’s statements regarding Omar and what Omar had told him were statements in furtherance of the conspiracy. The court further stated that once it heard the actual evidence, if it determined that the statements were not in furtherance of the conspiracy that it would then give a limiting instruction telling the jury not to consider the evidence against Katie. Tr. p. 480, ln. 22-p. 481, ln. 16.

Throughout the presentation of the evidence, Katie objected. Tr. p. 496, ln.

16-18 (objection to testimony about Mr. Oar's statement to Detective Bruner regarding Omar's desire to have Mr. Oar assist him in the plan to murder the detective and the CI on the basis that Katie was unaware of this information); p. 499, ln. 24-p. 500, ln. 5 (objection to testimony from Detective Bruner as to Mr. Oar's statements to the detective of what Omar wanted him to do with regard to assisting in the murder of the detective and the CI on the basis of hearsay and relevance); p. 505, ln. 10-14 (objection to questioning regarding the trafficking investigation against Omar and what was discovered about Omar and his co-conspirators' conduct in the community on the grounds that Katie did not even know who Omar was and that any information about what Omar did is not relevant to Katie's case); p. 507, ln. 16-20 (objection to admission of mug shots of and testimony about Omar and two of his drug co-conspirators as not being relevant to Katie's case); p. 510, ln. 17 (objection to testimony about the types of people and their motivations who become informants as not relevant to Katie's case); p. 522, ln. 21-p. 524, ln. 22 (objection to testimony about the dangers faced by informants both on the basis that there was no evidence that Katie knew that MD was a CI and further that MD, not Detective Bruner, should be the one to testify as to any fear she had); p. 534, ln. 15 (objection to testimony about the consequences to Mr. Allen for failure to pay his drug debt to Omar on the basis of relevance); p. 618, ln. 4-7 (objection to State's Ex. 13A-E on the basis that Katie was unaware of any of the documents which included a letter from Mr. Oar to Detective Bruner; a list of things Omar was requesting Mr. Oar to find out on his behalf; a list of drug dealers that



Mr. Oar told Detective Bruner he could assist in investigating; a list of drug dealers in a hierarchy; and a handwritten calendar setting out the timeline for Mr. Oar's probation violation hearing). Katie's objections were overruled and no limiting instruction was ever given. *Id.*

None of the objected to evidence - the evidence of Omar's murder plans, Omar's drug conspiracy, others' fears of Omar, and the dangers faced by informants would have been admissible in a trial against Katie.

Evidence of Omar's murder plans, Omar's drug conspiracy, other's fears of Omar, and the dangers faced by informants would not have been admissible in a separate trial both because the State had no evidence that Katie was ever aware of any of these things or even that MD was a CI. Moreover, Katie testified she was unaware of either murder plans or statements about murder plans. Tr. p. 1055, ln. 10-25; p. 1182, ln. 10-13. She further testified that she was never told anything about Omar except that he was a business owner housed in the jail with Mr. Oar who had lent out funds that she was to collect so that he could pay Mr. Sallaz to represent him. Tr. p. 1055, ln. 10-25. Katie also testified that she was never told nor given any reason to believe that MD was an informant. Tr. p. 1062, ln. 8-11. Omar's murder plans, his drug activity, others' fears of him, and the dangers faced by informants could not have played any role in Katie's actions when she was completely unaware of them and thus they were not relevant to the case against her. IRE 401 ("Relevant Evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence). *See State v. Rothwell*, 154 Idaho 125, 133, 294 P.3d 1137, 1145 (Ct. App. 2013) (question of relevancy of evidence is reviewed *de novo*; evidence about the positioning of a chair not relevant to defendant's credibility where no evidence was presented that defendant was the one who positioned the chair). Nothing about this evidence could make the existence of any fact supporting any element of the charges against Katie more or less probable. Nothing about this evidence went to prove the elements of conspiracy - that Katie had agreed with Mr. Oar to commit extortion, that she intended that extortion be committed, and that she or Mr. Oar took a substantial step toward the commission of extortion. I.C. §§ 18-1701, 19-2111. Likewise, nothing about this evidence went to prove the elements of grand theft by extortion - that Katie caused MD to deliver money to her by creating a fear that if the money was not delivered she or another would harm MD in the future. I.C. § 18-2403(2)(e). Katie could not use information she was unaware of to create a fear in MD. Likewise, the evidence is that MD was unaware of any murder plans by Omar and could not have been frightened by information she did not have.

Finally, Mr. Oar's statements to Detective Bruner about Omar's desire to murder Detective Bruner, the CI, and their families, were not admissible as statements in furtherance of the conspiracy. IRE 801(d)(2)(E). Detective Bruner told the court that the statements could have furthered the conspiracy to get money from MD because they would get the detective in the same room as Mr. Oar so that Mr. Oar could determine whether the detective was still involved in investigating

people in the drug conspiracy and evaluate the danger to Katie and himself in collecting money from these people. The detective concluded, “In other words, if I were still in contact with these people, he was not going to send Katie out to collect money because it would pose a risk to himself and Katie being discovered.” Tr. p. 474, ln. 22-p. 475, ln. 20. However, this explanation makes no sense. Mr. Oar was clearly not concerned about Detective Bruner’s investigation of or ongoing contact with those he sent Katie to see as he sent Katie to see MD knowing that MD was a CI for Detective Bruner. Mr. Oar’s statements to the detective may have furthered Mr. Oar’s personal plans to get the detective to put in a good word for him in his upcoming parole hearing, but they did nothing to further any alleged conspiracy between him and Katie to commit extortion.

Had the trials been severed, none of this evidence would have been admitted in Katie’s trial. As stated in *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 988, 938 (1993), interpreting the federal counterpart to ICR 14, a district court should grant severance when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk may occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. *Id.*

In this case, the risk warned of in *Zafiro* occurred. Evidence not otherwise admissible against Katie was admitted. The error was compounded when the court

failed to give any limiting instructions. This led to prejudice. In a case that was so close that the jury could not reach a verdict on the extortion charge, the jury considered inadmissible evidence in returning a verdict of guilt on the conspiracy charge.

As Katie moved for relief from prejudicial joinder and also objected to the inadmissible evidence as it was presented to the jury, the error in this case is subject to the *Chapman* harmless error test. *State v. Perry*, 150 Idaho 209, 227-228, 245 P.3d 961, 979-980 (2010), citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). *See also, State v. Orellana-Castro*, 158 Idaho at 762, 351 P.3d at 1220 holding that the State has the burden of demonstrating beyond a reasonable doubt that an improper joinder was harmless error.

The burden is on the State to demonstrate to this Court beyond a reasonable doubt that the error did not contribute to the verdict. This the State cannot do. The State's conspiracy theory is based upon the assumption that in the jail meetings between Katie and Mr. Oar they agreed to commit extortion. However, none of the other evidence supports this theory. None of the telephone calls indicate an agreement to commit extortion. None of Mr. Oar's writings to Katie indicate an agreement to commit extortion. Katie's testimony does not indicate an agreement to commit extortion. And, Katie's actions do not indicate an agreement to commit extortion. To the contrary all the other evidence in the case points to Katie being kept in the dark and being used by Mr. Oar to serve his own goals. Given the state of the evidence as well as the failure of the jury to convict on

extortion, the State cannot meet its burden of demonstrating beyond a reasonable doubt that the failure to separate the trials did not contribute to the verdict. Thus, Katie's conviction should be vacated and the matter remanded for a new trial.

*B. The District Court Erred in Admitting Irrelevant Prejudicial Evidence*

As discussed above, evidence of Omar's supposed plan to murder Detective Bruner and MD and perhaps others in their families was admitted over objection. Further, evidence of Omar's drug activity and the State's investigation thereof, including evidence about the dangers faced by confidential informants was also admitted over Katie's objection. As noted above, questions of relevancy are reviewed on appeal *de novo*. *State v. Rothwell, supra*. And, as explained above, none of this evidence was admissible because it was not relevant. IRE 401. None of it went to make any fact of consequence more or less probable. *Id.* The district court erred in the admission of all of this evidence.

Because the evidence was admitted over objection, the burden is on the State to demonstrate that the error was harmless beyond a reasonable doubt. *State v. Perry, supra*. And, as discussed above, this is a burden the State cannot carry. On this basis also, the conviction should be vacated and the matter remanded for a new trial.

*C. The District Court Erred in Failing to Give Limiting Instruction*

Although the district court discussed the need to give a limiting instruction as to evidence not admissible against Katie but admissible against Mr. Oar, the court ultimately did not give any such instruction. This error also requires vacation

of the conviction.<sup>4</sup>

In *Perry, supra*, the Supreme Court set out an exception to the *Chapman* harmless error analysis for cases in which the jury was not properly instructed. The Court wrote, “Where the jury reached its verdict based upon erroneous instruction an appellate court shall generally vacate and remand the decision of the lower court.” *State v. Perry*, 150 Idaho at 228, 245 P.3d at 980.

In this case, the jury reached its verdict based upon the erroneous failure of the court to instruct that evidence regarding Omar’s alleged murder plot was only admissible against Mr. Oar and not against Katie. IRE 105. In accord with *Perry, supra*, this Court should therefore vacate the conviction and remand.

## V. CONCLUSION

This Court should vacate Katie’s conviction and remand for three reasons: 1) the district court erred in failing to sever the trials and prejudice ensued; 2) the district court erred in admitting irrelevant and highly prejudicial evidence against Katie and the State cannot carry the burden of showing the error was harmless beyond a reasonable doubt; and 3) the district court erred in not giving a limiting instruction to prevent the jury from considering inadmissible evidence against Katie.

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<sup>4</sup> Note, however, that even a limiting instruction may not have been sufficient here. *See State v. Orellano-Castro, supra*, holding that a limiting instruction was not sufficient to alleviate the prejudice from improper joinder where the risk was that evidence regarding one alleged victim would convince the jury that the Defendant had also offended against the second alleged victim.

Respectfully submitted this 11<sup>th</sup> day of April, 2016.

/s/  
Deborah Whipple  
Attorney for Appellant Kathryn Blake

#### CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General  
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Dated and certified this 11<sup>th</sup> day of April, 2016.

/s/  
Deborah Whipple